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IN THE

United States Supreme Court.

No. 253.

ARTHUR W. WINDETT,

vs.

THE UNION MUTUAL L. INS. CO.

REPLY BRIEF

by

ARTHUR W. WINDETT.

IN THE

United States Supreme Court.

ARTHUR W. WINDETT,
vs.
THE UNION M. L. INS. CO. } No. 253.

BRIEF IN REPLY.

Recognizing the absolute invalidity and nullity of the Gage tax deeds, counsel contend that the amount paid in August, 1881 to Gage for his tax titles, $3,750, with interest, $1,806.24—$5,559.24 as computed by the Master in his Report (Pr. Rec., 27,) *is still due for taxes remaining unpaid, and being a charge on the land;* and that the Company had the right in August, 1881—two years after the last tax deed to Gage—to make the outlay in question, and charge it on the mortgage debt.

The Record supplies a clear answer to that question: *no part of the $3,750 paid to Gage by the Company through Hamilton, amounting with interest as found in the Report to $5,559.24 was for taxes then due, and outstanding, unpaid, and a charge on the land.*

It is alleged in the bill, (Rec. 6) that the Company paid Gage this amount August 15, 1881, "for tax title," and to "take up tax title"; this is the money paid by Hamilton in August, 1881, for which Gage made the

deed to Hamilton. Hamilton is the only witness to this transaction, and no other evidence is furnished on the subject from any other source; Hamilton identifies the sum paid, the subject of the transaction, and testifies to the fact that this payment to Gage was for the Gage conveyance of his tax titles, etc.; we find these facts reflected in the Master's Report giving the particulars, and making the identification complete. (Pr. Rec. 27.)

Gage having paid the taxes as found due by the tax judgment, the amount bid by him at the tax sale, and for which the sale to him was made—what *right did he acquire by his tax deeds?*

In *Miller* vs. *Cook*, 135 Ill. 190, the Supreme Court of Illinois adjudicated this question, and said, "What property rights, if any, *legal* or *equitable* did he, (*i. e.*, Gage,) get by his purchase of the lot for taxes? He bought strictly under the rule *caveat emptor;* and the doctrine is, *that he got the land or nothing.* * * "As against Appellant" (Mr. Windett,) "he got nothing "whatever except a *contingent equity* under circumstances "of a *particular remedy*, &c. If his title is good, he got "the land; *if bad, it is his own fault for he speculated on "the risk.*" *Ibid.*

The Court said, (*Brief* 4) "The tax sale did not make the buyer—*i. e.*, Gage—the owner of the equity of redemption. *He had no property right, nor title, nor interest, legal or equitable, in or to the lot.* (135 Ill. 190) In this case his only equity was to be repaid what he paid at the tax sale—the amount due and for which the land was sold for taxes, *if* the mortgagee should file a bill asking the *active* aid of the Court in declaring the tax sale illegal. *Ibid.*

In this case Mr. Windett having the patent title, and being in actual possession of the land, had no occasion

to file a bill to set the tax deeds aside, and the Company had no occasion to make the outlay in question.

It follows from the nullity of the Gage titles, that there was no necessity for the outlay; for since they were nullities, they did not constitute a *title*, nor even an *incumbrance*; and since the taxes due to the State had been paid, satisfied, and extinguished, no *lien* for taxes *existed*; the State had no claim, for its taxes had been paid; and Gage had no *lien* to entitle him to reimbursement, for the State gave him tax deeds which by his own fault alone were void—what claim had Gage on the owner whose land he sought to take away from him by unlawful and criminal means, for reimbursement?

After the tax sale and while the two years redemption were running, the penalties, 50 per cent. per annum, and interest 10 per cent. per annum, were accumulating in his favor. The State no longer had any claim, for its taxes had been paid by the proceeds of the sale, nor any lien; and the purchaser, Mr. Gage, had the statutory promise of a deed from the State, or *reimbursement* from the owner in full, with penalties and interest, if the owner made the *legal*, statutory redemption; the right to which expired at that time, and no longer existed. But if the owner after the two years had run sought to make an *equitable* redemption, he could only have it by defeating the tax titles as made in violation of the law, and on the equitable condition of reimbursement of what had been justly due to the State, and actually paid by the tax buyer—however delinquent in complying with the law, but *without penalties*. *Webster vs. Nichols*, 104 Ill. 180—a decision upholding Mr. Grosscup's contention for the very *opposite* of what he now contends for before this Court as being the rule of law. Consequently, the several contentions of the Company's counsel fall to the ground.

We admit freely, if we had asked the *active* aid of the Court in equity to remove these tax titles by declaring them illegal, we should have had to reimburse, &c., for that would have been fair; not the *penalties* as inadvertently contended by Mr. Grosscup; but simply the amount paid by Gage at the tax sales, with six per cent. interest, excluding all penalty. *Webster* vs. *Nichols* 104 Ill., 180.

This is the single exception, and only instance where anything can be done in favor of Gage. *Miller vs. Cook* 135 Ill., 190.

In that case the Court distinctly determined the question by a categorical adjudication, that in this case Gage at no time after receiving the tax deeds had any legal or equitable right of any kind. He had no right to the land, for his deeds were null and void by reason of his own misconduct in procuring them to be made in violation of the law.

Nor had he after the making of the tax deeds, any right in equity to reimbursement, for equity denies to him any such right. *Miller vs. Cook.* (Brief 4-6.)

Gage having paid the amount bid for taxes, and for which the land was sold by the State, received a certificate entitling him to a deed at the end of two years, *if* not redeemed, provided he performed the conditions imposed by law.

No tax debt, or *lien* remained as a *subsisting* charge on the land so far as the State was concerned. We are not left in the dark. *Smith vs. Prall,* 133 Ill., 314; (Brief 17.)

Mr. Gage had purchased and held the contingent right to a deed giving him the title in fee simple on complying with the direct and explicit directions of the statute notice of the sale, and of the time when the redemption would expire, but *subject to the penal consequence of ab-*

solute and total loss in case of non observance, or violation of the statutory provisions.

The supreme act on which for him all depended, was the giving the formal written notice, and establishing that fact by sworn affidavit on applying to the State officers for a tax deed.

Carne vs. *Hughes*, 135 Ill., 519-29.

Gage vs. *Bani*, 141 U. S. 34-57.

By the sale for taxes, and payment by Gage of the amount of the taxes for which the sale was made, the taxes ascertained as a debt due to the State by the tax judgment, were *satisfied*. They no longer remained a charge on the land; and the *lien* in favor of the State to enforce their payment, was extinguished; it no longer existed, and the land was *discharged* therefrom.

Smith vs. Prall, 133 Ill., 314—*express*

In that case it was formerly adjudicated, and expressly declared, that by the sale for taxes and payment by the tax buyer of the amount of the taxes for which the sale was made, the taxes as a debt due the State, were satisfied; and the *lien* in favor of the State for their payment, was extinguished and removed. (*Brief 17.*)

Thus it is established by a demonstration rising to a judicial certainty that no *part* of the sum paid to Gage by the Company for his tax deeds and titles for which the bill prayed reimbursement, which the Master's Repart allowed, and the decree adjudged, is, or was at the time of the outlay in August, 1881, or at any time since the deeds were made to Gage, a *lien*, *charge* or *encumbrance* on the land.

It follows of necessity, that the outlay for the Gage deed to Hamilton, was not authorized by the terms of the mortgage. We submit the following authoritative statements of the rule. The mortgagee seeking a foreclosure can only claim the mortgage debt, Jones on

Mortgages, 1083; citing *Anthony* against *Anthony* Ark. 479. He cannot require payment of any other debt not a *charge* upon the premises. Jones, Mortages, 1081, citing *Burnett* vs. *Deniston* 5 *Johnson* Ch. 33. He is only entitled to reimbursement for an assessment or tax which is a *lien*. Jones Mortgages 1134, *Day* vs. *McEvers*, 2 Cow., 518: *Rapplye* vs. *Prince* 4 Hill 219.

The mortgagee will not be allowed to recover money paid for taxes illegally assessed: where the payment might have been successfully resisted. Jones, Mortgages, 597, citing, *Atwater* vs. *West*, 28 N. J. Eq. 361.

The case is not the same as if the Company had intervened by making the outlay, and removing the tax certificates of sale *before* the tax deeds were made to Gage, while those certificates were still a *lien*, and redeemable, by paying the amount of the taxes sold for, costs, penalties, and interest, &c; and while it was still in Gage's power to perfect his title by obtaining the statutory deeds: for at that stage of the proceedings the *lien* of the taxes proper had been superseded, and its place taken by the *lien* of the tax certificates.

When Gage had paid the amount of the taxes at the sale taking the certificate therefor to ripen into the right to a deed on compliance with the statutory requirements, certain consequences *ipso facto* came into existence:(1.) The claim by the State for taxes—its *lien* for their payment *ceased*, and the land was *discharged* therefrom, *Smith vs. Prall* 133, 111, 315; the *extinction* of the taxes as a debt to the State, and as a charge on the *land, released* the land from the burden.

(2.) The existence in Gage of the legal right at the end of two years from the sale to a deed from the State, *provided* he complied with, and did not violate, the statutory requirements, &c., and the owner did not

redeem, and by redeeming, prevent the issuing of a deed.

By Gage's failure to perform those conditions, the tax deeds were rendered void; and "*the chance on which he speculated*" was gone but for his friend Hamilton getting this company to save his speculation for him by Hamilton taking and holding the deed, acting as stakeholder.

We point out the farther consequence of the foregoing, that when the Company made its outlay, &c., in August, 1881, (Pr. Rec. 6,) Gages' claim of title under his tax deeds was simply an adverse, hostile title, and not a *lien*, *incumbrance*, nor a lawful adverse title, nor did it constitute *taxes* in any sense of law or fact. It is plain, that the provisions of the mortgage did not authorize the mortgagee at discretion to buy up outstanding hostile claims of title; and we submit that the Gage outlay was not rightfully made in any point of view.

The question recurs—if the Company had made the outlay for a *good* title outstanding, adverse, and endangering the mortgage security, would such outlay have been authorized by the terms of the mortgage?

(*a.*) The difference between the case as supposed, and this as it stands on the record, is infinite, for the outlay would have then been a benefit to the mortgagor, and necessary for the mortgagee; whereas in the actual position as existing in August, 1881, the outlay was solely for the benefit of Gage—saving him from loss as a consequence of the "*risk on which he bought and speculated*;" (*Miller* vs. *Cook*, *supra.*) The outlay was not for the benefit of the mortgagor, for it was made the occasion of burdening his equity of redemption by an addition of near $6,000 to the mortgage debt; it was of no benefit to the Company in a legitimate sense, for Gage's pretended titles were worthless as even Hamilton confesses; (Pr. Rec. 30). The only person bene-

fited by this strange transaction was this man Hamilton --professional tax speculator, and dealer in tax titles. like Mr. Gage, who took advantage of being the Company's agent, professional adviser as to these matters, and member of the same fraternity of tax speculators with Gage, to advise, and to procure the Company's consent, that the deed from Gage be made to himself, while its cost, near six thousand dollars, should be charged to Mr. Windett.

This was thrifty in Mr. Hamilton, if not entirely sagacious, although an act of outrageous perfidy, and bad faith in all concerned in it except Gage--Mr. Gage makes no professions except when applying for tax deeds. Even if the Company had got from Gage a good title under his tax deeds or otherwise it could not compel us to pay for it without delivering that title to us—but neither the Bill, Report, nor Decree contains such offer or requirement.

In the equity of recision, specific performance of agreements to convey, declarations of trust express or constructive, in whatever form the equity is *executory* requiring the arm of the Court to carry it out, in all such cases, the indespensible *pre requisite* to relief, is performance, or its offer with the power of performance, as the condition to relief. That rule applies here. It would be unjust to allow the Company reimbursment for buying an outstanding adverse title, good or bad, and allow them to keep it, or which is the same-thing, allow—Gage—Hamilton—to keep it.

It results that upon a sale for taxes being made and completed by actual payment of the amount of taxes sold for, the State has no longer *any claim* or *lien* of any kind; its debt is satisfied from the proceeds of the sale, and its tax *lien* extinct. If a forfeiture to the State takes place and not a sale, the State can only enforce

that forfeiture by decree upon a statutory bill filed for that purpose, and on affirmatively establishing a complete and substantial performance of the requisites, &c. We refer to the recent case of *People* vs. *Henckler*, May 9, 1891, *per* Mr. Justice Baker, speaking for the Illinois Supreme Court, (Brief 33.)

In this case no claim existed on behalf of the State, Gage cannot claim by or under a forfeiture; and is relegated to the position accorded to him by statute, and judicially defined in *Miller* vs. *Cook*. (Brief 3-5.)

Counsel represents us as having only the right to *redeem* as a consequence of the want of notice, &c.

This is in error:

(*a*) There is no right to redeem after the two years from the tax sale; we claim no such right.

(*b*) If the tax deeds had been good, and the title under them, we could not have them removed as clouds on the title. They would not have been *clouds*, but would have been a good title in themselves. *Miller vs. Cook*. (Brief 3–5.)

(*c*) It is not necessary for us holding by a clear patent title, and in peaceful exclusive possession which neither Mr. Gage nor Hamilton can contest, to take any steps against the tax titles. We cannot bring ejectment for we are in possession. Mr. Gage—Hamilton—might have brought ejectment, but could not recover, for their titles were void and barred by the statute.

Counsel assumes—represents the existence of a tax deed, or deeds to Gage, &c., as having been proved in this case; from which he infers the prior facts of the tax debt, judgment, assessment, non-payment, sale, &c., and the consequent dishonesty of the owner in not having paid the tax, &c.

(1.) The deed is only made such *prima facie* evidence of the prior facts constituting the taxes an obligation, &c., when it is made in "in pursuance of the provisions aforesaid," but these Gage tax deeds were not "made in pursuance" but in violation, "of the provisaforesaid," and could not by the statute be *prima facie* evidence for any purpose whatever.

2. As many times already pointed out, notwithstanding the repeated positive statements of the counsel, and the constant implications of his argument, no proof exists, nor can be found in the Record, of any taxes having existed, of non-payment of them, of any judgment, or sale for taxes; or of any antecedent fact which alone could authorize the making of a sale, or deed, for taxes. (*Brief 16.*)

3. *The Record contains no evidence that any tax deed was made to Gage.*

There was an omission on the Company's part to offer any such proof. This omission is not supplied by our evidence that tax notices were not given.

The want of equity surrounding the Gage tax titles, and attendant upon their transfer to Hamilton, is placed in a clear light by the circumstances and nature of the origin of the tax deeds--obtained stealthily, without notice to the owner, or the tenants in possession, the artful concealment from these persons in interest, and positive imposition upon the State Officers by fore sworn affidavits that such notices had been given. These circumstances of conduct present a case requiring for the protection of the public, at least the emphatic expression of the displeasure of this Court. It is not to be forgotten, that this Insurance Company, and its President, Mr. De Witt, with Hamilton their agent, instigator, and adviser, deliberately with full knowledge became accomplices with Mr. Gage for the purpose of

preventing redemption by allowing simple payment of the debt; abusing this foreclosure proceeding and preverting the jurisdiction of this Court of Equity, for sinister purposes.

AS TO THE CLAIM FOR FEES.

The ground taken by the Company and its counsel imposes the unwelcome duty of recurring to the subject.

I. Counsel stated in the oral argument as well as in the printed Brief, that there were but *two* Connelly cases.

1. The Connelly litigation consisted of the following cases:

(*a.*) In the county court, suit and judgment in Forcible Detainer; motions to set aside the judgment; to recall the writ of possession; several hearings; judgment for the Company; prayer of appeal; and settling bill of exceptions.

(*b.*) Hearing on argument of Connelly's appeal in the Appellate Court; resulting in final judgment in the Company's favor.

(*c.*) *First* bill in Chancery by Connelly in Circuit Court enjoining the issue and execution of proscess, and to set aside the judgment in the county court. This suit was defended for the Company by answer to the bill, motion to dissolve, &c., and on final hearing, bill dismissed.

(*d.*) This *first* chancery case was appealed by Connelly to the Appellate court, and on the appeal the decree was affirmed.

(*e.*) A *second* bill for injunction in chancery was filed by Connelly; injunction obtained, and like defense made for the Company, and like result.

(*f.*) This *second* chancery case was taken by Connelly to the Appellate Court, and the decree below af firmed.

(*g.*) A *third* chancery bill for injunction was filed by Connelly. Mr. Windett filed a Demurrer for the Company. The Company directed Mr. Swett to promise Mr. Windett $100 as a retainer in this case. (Letter of Swett, Sept. 21, 1881, Pr. Rec. 110). These suits were all conducted by Mr. Windett for the Company, and gained.

The facts as to the Connelly litigation—its extent, nature, the quality and value of the services actually rendered in it—are detailed by Mr. S. K. Dow, who conducted it for Connelly, (Pr. Rec. 46, 47 and 48); J. Burnham, who was Mr. Windett's assistant, paid by him; (Pr. Rec. 36-40.); Mr. Windett as witness; (Pr. Rec. 30-36); and by the record copies of one of the briefs, and two of the chancery bills. (*Pr. Rec. 34; 89-100*). In the face of Mr. Dow's testimony, and the records produced, the Master allowed only five hundred dollars for these services giving as his reason, that the only testimony on that subject was that of Mr. Windett and his assistant. *He shut his eyes to the testimony before him, and sought to justify himself by denying its existence.* (*Pr. Rec. 28.*) He disposed of the testimony of the several gentlemen as to the value of the Connelly services by saying that "it was entirely based on a *hypothetical* question," *i. e.* without knowledge of the facts, "*and that these witnesses were not cross-examined for this reason.*" (*Pr. Rec. 28.*)

We point out, that Mr. Dow had knowledge of the facts in the Connelly cases, and based his estimate of

the value of those services on it, not a *hypothetical question*, as alleged by the Master. Besides, Messrs Burry and Kreizinger state that they had read Mr. Dow's deposition, and based their estimate upon the facts stated; and these two witnesses were cross examined by Mr. Grosscup and Mr. Swett. (*Pr. Rec. 55-68.*) Mr. Dow was crossed examined at length by Mr. Grosscup; (*Pr. Rec. 49-51*) as was Mr. Burnham upon the same subject; (*Pr. Rec. 40-45.*) the Master adding, "*there was no question that the services extending through the various stages of the Connelly litigation, were of a substantial and valuable character;*" but that he allowed only five hundred dollars for them because the only proof of them was given by Mr. Windett and Mr. Burnham. (*Pr. Rec. 28-25.*)

We only ask that the testimony of the expert witnesses be read.

Mr. Windett's account of the services corresponds substantially with Mr. Dow's.

The Master's language and conduct are unintelligible.

As to this part of the Report the Master exceeded his authority. The order of reference solely directed him to compute, and report the amount due on the note and mortgage. (*Pr. Rec. 19.*) He had no authority to attempt the exercise of *judicial functions* as to the matters and merits of the defense. We respectively refer to the brief 45-47. The Master usurped functions which did not belong to him as a ministerial servant of the Court. It may be contended, that the confirmation of his report, was equivalent to an original direction to pass on these questions. But for the reasons already advanced, (*Brief 44-7*) the Court could not relinquish its duties, or delegate its functions to a mere ministerial officer as the Master was. The ratification of the report by the respected Judge who rendered the decree, did not

purge the error. On the contrary, adopting the report in its integrity simply perpetuated the Master's fault. We were entitled to have these judicial questions—the elements of controversy—looked at by the clear eye, and considered by the mind of the Court; and not by a subordinate of simply ministerial qualifications, whose instincts, motives, and habits are not judicial. *In no civilized country are judicial functions and duties entrusted to officials whose emoluments depend upon their conclusions.*

2. Mr. DeWitt testifies that Mr. Windett *sought* the employment. (*Pr. Rec., P. 112.*) Mr. Kendall claims that *he* engaged Mr. Windett's services, (*Pr. Rec., 80.*); and Mr. Grosscup says that his employment by the President, was at Mr. Kendall's instance. The first communications emanated from Mr. DeWitt. Mr. Warfield who wrote them is not produced to support Mr. DeWitt. This is not our fault, for we could not control the Company's resources of testimony. What was Mr. DeWitt's object in this attempt to place Mr. Windett in an unfavorable light? His evident ill-will shows purpose. Mistake or inadvertance is out of the question. Mr. Windett's testimony as to the way he came to be employed, (*Pr. Rec. 31.*) is thus clearly shown to be correct. Besides, Mr. Kendall directly contradicts Mr. DeWitt, and what the Company's officers told Mr. Burnham, (*Pr. Rec., 39, 40 and 46,*) agrees with his account; and the same may be fairly said of Mr. Dow, (*Pr. Rec., 48.*)

II. Mr. DeWitt next says that Mr. Windett was only employed in *two* cases and *no others*; (Pr. Rec., 11); and his counsel takes that position in argument and brief; (23-4.)

Even Mr. Kendall, his local solicitor and witness, shows this to be incorrect.

Mr. DeWitt testifies, that there was no general retainer; that Mr. Windett was not employed in fifteen or twenty cases, &c.; that he was only employed in the two cases of Carmichael and Connelly, and *no others*. (*Pr. Rec. 121.*)

(1) Mr. Kendall's notes show the employment in the McGovern case; the master found that fact proved, and allowed one hundred dollars for services in that case. This is conclusive that Mr. DeWitt was in error as to the *extent* of the employment; and establishes the *general character* of that employment. This testimony of Mr. DeWitt was not inadvertently given; but this substantial incorrectness is fatal to its trustworthiness. It is contended, that the testimony of Mr. Burnham and Mr. Windett was *interested*. Mr. DeWitt and Kendall were no less interested, though Mr. Grosscup says somewhat strangely that they are not. Whether the witnesses on both sides are interested is comparatively unimportant; their truthfulness is the main thing. It is of clear certainty, that Mr. DeWitt is gravely in error in denying *any* employment except in *two cases;* for of absolute certainty, Mr. Windett was employed, rendered services in the business of McGovern foreclosure, the investigations and steps leading to it, and until the trial was reached; and the Master found the fact, and allowed one hundred dollars for those services.

We ask leave to present the evidence on this point.

Mr. Windett's testimony shows the facts. The letters bear him out. Thus, July 3, 1878, Warfield for De Witt writes a pressing request to see Mr. Windett personally, and at once. (Ex. A. Pr. Rec. 107.) July 16, 1878, he makes an appointment with Mr. Windett personally for De Witt. The testimony is, "that early in July, 1878, De Witt sent for me to come to the Company's office; in a day or two I waited on him. He said

he had sent for me as he wanted to engage me on behalf of the Company professionally with reference to 15 or 20 litigated cases growing out of the Company's foreclosure proceedings; that Kendall could not attend to them. He said he was aware of my professsional character in regard to complicated ligitated cases, and wished to entrust that part of their interests to my management. I accepted the engagement, &c. (Pr. Rec. 31.)

It will be borne in mind that the Company held a mortgage for $43,000 on 60 acres of land on the boulevard, made by the McGoverns, beside the two small mortgages on the lands leased to Connelly, involved in the suits with him for possession referred to in this evidence; *the larger Mortgage with the abstracts of title to the boulevard tract were placed in Mr. Windett's hands by the Company's officers, investigated, and advised upon by him as to the course to be persued, &c., being part of the business entrusted to him under the general employment in 1878, and the subject of consultations, &c.,* The several contests with Connelly, four separate suits, six judgments in three courts, &c., relating to the Adams street lots, being but a branch of the general McGovern transactions; of which the principal part was the foreclosure of the $43,000 mortgage on the 60 acres and the anticipated struggle for its redemption by the Mc Governs, which in time ensued; and is reported in the Ills., Reports.

Kendall's note July 8, "79, (Ex. J,) written just after the great McGovern suit for redemption of the 60 acre tract from the $43,000 trust deed had begun, requests Mr. Windett to return to him the trust deed, McGovern and wife, for $43,000, and acknowledges receipt of it. (Pr. Rec. 109-10.)

By his note Sept. 23, 1878, Mr. Kendall writes for an interview at his earliest convenience, about the Mc Govern case, and says, "Mr. DeWitt is here, and wants to know the status of the McGovern case." (*Ibid.*)

July 31, 1879, (Ex. H.) Kendall says Mrs. McGovern has filed a bill to redeem all her property, and he is attending to the new suit, and asked to be posted up; and asks a few days afterwards Mr. Windett to furnish him with a list of authorities. (*Ibid.*)

Mr. Burnham testifies: I knew from the officers here in Chicago that Mr. Windett was retained in regard to special matters outside of the ordinary routine law business of the Company, and was employed as special counsel in matters requiring exceptional learning and skill. I very frequently called at the offices of the Company, in connection with the Company's business in Mr. Windett's hands, and talked with Mr. Kendall, the attorney, and Mr. Warfield, the financial agent, in regard to these matters. These matters were always referred to as matters in which Mr. Windett was specially employed. At each new phase of this litigation Kendall said that as a matter of course, Mr. Windett should go on with each new case, because he was in charge of the whole matter. He was referred to as being the Company's adviser in all matters outside of the ordinary routine law business of the Company; and when the bill was filed (July 1, 1879,) by McGovern. attacking the sale—the foreclosure sale under the trust deed—Mr. Kendall advised with Mr. Windett in regard to that matter. It included the sixty acre tract with others, and spoke with me once or twice in regard to it, recognizing Mr. Windett as the adviser of the Company in regard to those matters. Those things occured from time to time as I was in the office. I remember

the general course and run of events that occurred in that connection (*Pr. Rec. 39–40.*)

On cross-examination Mr. Burnham says: When I speak of the McGovern case as distinguished from the Connelly case I refer to the chancery suit brought by McGovern attacking the foreclosure of the sixty acre tract and other property involved in that. Again, I know that Mr. Windett during the years 1879, 1880, gave earnest and a prolonged attention to the matters entrusted to him by the Company, from time to time advising the officers of the Company, in Court, and directing the matters in which I participated; and from my own knowledge as a lawyer I can say that the services of Mr. Windett were of a very high order, were very skilful, and that the records of all that was done show they were successful. I understood from what passed between him and the officers of the Company, and from what was said to me by Mr. Kendall in regard to these matters, that the controversy between the McGoverns and the Company, *apart from the Connelly cases, was included in the suits entrusted to Mr. Windett's management.*

The above array of incontestible facts and testimony given by Kendall and Burnham, with documents and the conduct of the parties at the time, demonstrate that Mr. DeWitt's pitiful fictions are simply an afterthought, and quite unworthy of any serious consideration.

Mr. Burnham was employed by Mr. Windett as assistant in 1878, and Windett in consequence of the engagement formed with the Company, made suitable arrangements and enlarged his office force to prosecute this business. He says that he was frequently in communication with officers of the Company on Mr. Windett's behalf, in connection with their business in

Mr. Windett's hands; and that he knew from them that Mr. Windett was retained in several special matters outside of the routine business, &c., and often called at their offices on this business, and talked with Kendall and Warfield about them. Kendall, said Windett should go on with such and such matters, because *he was in charge of all the matters* outside of the ordinary routine, &c. Kendall referred to Windett as the Company's adviser. When the McGovern bill to redeem the sixty acre tract, attacking the sale under the $43,000 Mortgage was filed (in 1879,) *Mr. Kendall advised with Mr. Windett about it and recognized him as having charge of that matter.* "I remember the general run of the conversation." Witness meant the McGovern case to redeem the 60 acres from the sale, &c., (not the Connelly cases,) and knew from what the officers and Kendall said, that matter was included in those intrusted to Mr. Windett to manage for the Company. This is conclusive in corroboration of Mr. Windett's statement, "that *the entire McGovern matter, claim and mortgage, and the conduct of the business connected with it, was entrusted to me.* I so understood it at the time," &c. (Pr. Rec. 30-6.)

The brief notes written at the time, place this matter beyond doubt.

Note in pencil at foot of Exhibit C., dated July 20, 1878, shows that Mr. Windett received from Mr. Kendall with other property, "the two mortgages by Mr. McGovern made in 1869 and 1873."

September 23, 1878 (Exhibit E.) Kendall requests an interview with Mr. Windett at *earliest* convenience, &c.; adding that "DeWitt is here, and wants to know the *status* of the *McGovern case*," &c.

Oct. 8, 1878, Mr. DeWitt asks for "an *immediate* interview."

Exhibit F. Mr. Kendall writes July 21, 1879: "Please post up. *Mrs. McGovern filed a bill to redeem all her property*, and prays for an injunction writ in Connelly suit," &c.

Exhibit H. July 23, 1879. He asks Mr. Windett "for a list of authorities," &c., Exhibit I, and the same day, writes asking Mr. Windett "to send him the trust deed, McGovern and wife to Boone to secure note of $43,000." (Covering the 60 acre tract on the boulevard, &c.

And September 3, 1879, "receipts for the above deed.

Exhibit J. May 20, 1880, Mr. Kendall writes: "Please send me the John Walsh trust deed, note, trustees' deed, &c., which had been used in the Connelly suits," &c., adding: "*The suit of McGovern vs. The Ins. Co. is on the call*, &c., the first intimation that the McGovern suit was withdrawn from his charge being in Kendall's note of July 21, 1879, that "he was attending to the *new* suit."

Here it is plain that the Company, its Officers and Counsel are in error in saying that *all* that Mr. Windett was employed in were the Connelly and the Wright lot cases.

Mr. DeWitt's testimony to the same purport, but given with more emphasis, is at variance with fact. Without any disrespect to either of these gentlemen, we refer to several cases in the Illinois Reports involving the transactions of this Company, and these same officers, wherein the State Court and Judges have had to weigh their testimony, and have in every instance found the testimony of these witnesses, whether from feeling or interest, of such a character that it must be disregarded.

Union Mutual vs. *White*, 106 Ill., 67.
Union Mutual vs. *Slee*, 110 Ill., 35.

Mr. DeWitt's testimony can have but a minimum weight. This leaves the facts as stated by Mr. Windett in his evidence as fully established. They demonstrate that the original employment in July, 1878, contemplated the conduct of a mass of litigated and difficult cases of an important and complicated character; that it was general and comprehensive in its scope. That that employment was accepted and acted on in good faith on that understanding, and its duties faithfully discharged; and the eminent gentlemen who have testified as to the compensation for it, show that $5,000 was a proper charge for a retainer of that kind.

In July, 1878, the Company's interests, and complicated difficulties affecting its securities, imperatively required certain professional assistance. Its officers, including its president, made choice of Mr. Windett. They tendered him a certain range of employment and business. Its prosecution involved losses of their property to many persons. Of all persons, debtors to this Company, whose interests were likely to be affected by its course and proceedings, (a numerous class in that community,) none would of course seek his assistance, but go to others. The very fact of the employment by this great Company, its acceptance and entrance by public action upon it, was of serious import to him as to any other counsel, in its immediate and necessary consequences upon his existing and future relations to present and prospective clients. Besides the Connelly and McGovern cases, the Company and its attorney and officers had the full benefit of these numerous interviews, consultations, and advice given in reliance upon their good faith, as was seen in the result of the great McGovern controversy, the lines of which had been laid down and advised upon by Mr.

Windett, as the above facts show, and the Company afterwards reaped the benefit.

It would be a very great injustice to allow this Company after having committed Mr. Windett irrevocably to its interests, and thus debarred him from a much wider field of professionally activity; and particularly after obtaining from him the clue to success which he under these circumstances placed in their possession, to avoid making him a suitable compensation, simply because two years afterwards they saw fit to place this business in other hands, without there being even the slightest intimation of fault on his part.

One of the witnesses, Mr. Bonney, says the charge of a general retainer would be justified, even though not one of the many contemplated cases would be placed in his hands. This was on the ground that the initial act of engaging his services, and imposing upon him the full weight of professional responsibility and trust, tied his hands so as effectually to prevent his accepting an engagement from any of the Company's debtors whose interests were involved, no matter how great might be the inducements, nor how strong the consideration which they might offer him. Mr. Burry emphasizes this view of the case by saying that the retainer in such a case by one not a regular or constant client, should be at least 50 per cent. higher than in a case of a regular client. He is supported in this view by the concurring sentiment and testimony of all the other witnesses, Jewett, King, Steele, Isham, Dow, Bonney, Kretzinger, and Pence, whose statements are conclusive upon this question. If in the third Connelly chancery case, when on dissolution of the injunction, Mr. Swett could charge and assess damages at $2,000, for their services in that *one* case, we think that our service in getting six judgments in original and

appellate jurisdictions were worth what we ask for them.

In this case a retaining fee of the amount indicated is just as a proper charge or compensation for hearing the matters, giving them consideration for a course of action, involving a commitment of the party to the business of this client, and tying his hands, &c., adopting the testimony of Mr. Burry, Mr. Boney and Jewett, and the estimates which they formed,

We claim as to the extent and scope of the original retainer in July, 1878, that it was general, not restricted to one or two cases by way of experiment, but that it embraced all the Company's litigated business outside of its ordinary routine character; and that in fact the entire McGovern controversy under the foreclosure of the sixty acre tract, and the bill filed in July, 1879 for redemption from the foreclosure, was a part of the business entrusted to Mr. Windett, and was the subject of his action and conferences with the officers of the Company.

We call attention to the distinction between the payment to Gage for "tax titles which had matured upon the tax deeds" in the words of Mr. Hamilton, (*Pr. Rec. 88*,) and the other payments which he speaks of having made for the Company for taxes and park assessments as *current liabilities without* sale, or the issue of tax certificates, or deeds. Our objection is directed against the payment for the tax *titles and deed exclusively; and to* the purchase at tax sales for which Hamilton *took out and held certificates* which would ripen into tax deeds, and titles.

Hamilton says, that August 22, 1882, he bought at tax sale for $1,004.78 and the same day for $188.96 receiving certificates of sale therefor; and that on September 8, 1884, he bought and took out a certificate in the name of H. C. Bates. These several sums, amounts

and sales make no part of the thirty-seven hundred and fifty dollars paid to Gage; they are essentially different matters, (*Pr. Rec. 88, Brief 29.*) On these latter certificates tax deeds could be taken out by the holders, strangers to this record, and not bound by this decree. The Master allowed these charges amounting to $1,457.57, without any proof of an offer, or requirement to surrender and cancel these certificates on receiving payment.

The rule is, "*A mortagee buying at a tax sale is not entitled to add the amount to his mortgages debt. Such a purchase is not a payment of taxes; but the purchase of a new lien independent of the mortgage. Jones, Mortgage, Sec. 1080, citing Williams vs. Townsend,* 31 N. Y., 411.

We submit, that these purchases by Hamilton without return and cancellation of the certificates which were taken and held by him, and on which the holders would be entitled to new tax deeds, were purchases of *new liens*, or titles, and not *payment of taxes.*

And since there is no claim that the certificates have been cancelled, and no offer to surrender, or release them is shown by the Report, Decree, or otherwise, it was error to include them in the Report, and Decree.

A final objection is made by the Company, that although the engagement was made in July 1878—entered upon and acted under for two or three years, and though the Company had the benefit of Mr. Windett's service under it, apart from the Connelly litigation, and the Carmicheal case, that the Company is not liable, or bound to make compensation.

The English rule as to barrister's retainers, and a South Carolina case fifty years old, are cited as the sole support of this contention, which though made by this

Company, is not what we expected from its counsel. It is purely technical—even if it were not dishonest; it is in every way unworthy. The English rule as to barristers is not law here, and is not applicable to our conditions, and professional usages. It is a satisfaction to know that in a hundred years, the immense fields of litigation in this country—several hundred thousand of reported cases, show but *one* precedent for the rule contended for, and but a single example of the Company's defense. That rule is not the law of this land.

It would be most unfortunate for clients if considerations of honor, responsibility, and disinterested good faith, should be discarded from professional relations. In the judgment of the gentlemen who testified on that subject, the relations created by the engagement entered into by the Company with Mr. Windett in July, 1878, imported distinct legal obligations and responsibilities on both sides.

It would be indeed unfortunate if the Company's contention and example should prevail.

For the considerations above submitted, we respectfully pray that the Decree may be reversed.

April 8, 1892.

ARTHUR W. WINDETT.